(5)

No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JEROME J. SHESTACK*
PRESIDENT
AMERICAN BAR ASSOCIATION
750 N. Lake Shore Drive
Chicago, IL 60611
(312) 988-5000

WILLIAM H. JEFFRESS, JR.
SCOTT L. NELSON

Counsel of Record

24pp

QUESTIONS PRESENTED

1. Whether, when a client dies, the attorney-client privilege in a criminal proceeding is no longer absolute, but is subject to a balancing test that requires the attorney to produce evidence of privileged communications with the client if they "bear on a significant aspect" of the case "as to which there is a scarcity of reliable evidence."

2. Whether, as a matter of law, an attorney's handwritten notes taken during an initial interview with a client do not receive the virtually absolute work product protection otherwise afforded to an attorney's "mental impressions," because at this stage the lawyer "has not sharply focused or weeded the materials" and exercised professional judgment as to what to record.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES:

OTHER AUTHORITIES:

INTEREST OF THE AMICUS CURIAE

Amicus curiae, the American Bar Association, has a keen interest in attorney-client confidentiality, which is directly affected by issues, such as those presented here, involving the scope of the attorney-client privilege and the attorney work-product doctrine.[1] The many members of the ABA who practice law are directly affected by decisions limiting the scope of the privilege and requiring production of communications with their clients, and their relationships with their clients feel the impact of such decisions.

The ABA has long taken a leading role in developing standards governing the obligation of attorneys to maintain the confidences of their clients. In 1908, the ABA adopted its Canons of Professional Ethics, providing in Canon 37 that "[i]t is the duty of a lawyer to preserve his client's confidences" and that "[t]his duty outlasts the lawyer's employment." The ABA's Model Code of Professional Responsibility, adopted in 1969, similarly required a lawyer to protect confidences and secrets of a client both while the representation continued and after it ended. The Model Rules of Professional Conduct promulgated by the ABA in 1983, which reflect the ABA's current policy on confidentiality, continue to provide that the obligation to preserve confidences remains intact after the termination of the attorney-client relationship. The ABA's Standing Committee on Ethics and Professional Responsibility has taken the view that this obligation continues after the death of the client.

---

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission.

The ABA recognizes that the ethical obligation to preserve client confidences and the legal protections embodied in the attorney-client privilege and work-product doctrine are related and serve the same general goals. Indeed, without these legal protections, the lawyer's ethical obligation to preserve confidences could be considerably impaired. As Comment [5] to ABA Model Rule 1.6 explains:

> The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

Because of this interrelationship between the privilege and the ethical principles it reinforces, the ABA necessarily takes an interest in important issues involving the scope of the privilege.

In addition, through its Litigation and Criminal Justice Sections, the ABA seeks to define the roles of lawyers in civil and criminal litigation and to improve the civil and criminal justice systems. The issues presented in this case directly implicate these goals. The ABA also seeks, through its Commission on Legal Problems of the Elderly, to improve legal services for the elderly—an objective affected by this case insofar as the rule laid down by the lower court, by weakening the attorney-client privilege after the death of the client, may have a significant effect on the elderly and others who seek legal services in anticipation of their own death.

These interests lead the ABA to support the petitioners' position that this Court should decide the issues presented in

this case, for the reasons stated below.[2] Both the petitioners and the respondent have consented to the filing of this brief.

REASONS FOR GRANTING THE WRIT

I.
THE D.C. CIRCUIT'S NOVEL HOLDING LIMITING THE ATTORNEY-CLIENT PRIVILEGE AFTER THE CLIENT'S DEATH PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE

The decision of the United States Court of Appeals for the District of Columbia Circuit marks a substantial departure from the "principles of the common law" as they have historically been "interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. The decision below represents the first time a federal court has ruled that the death of a client so weakens the attorney-client privilege that it may be overcome, at least in a criminal proceeding, on the basis of a court's balancing of the government's claimed need for privileged information against the client's interest in confidentiality.

This novel ruling has the potential to affect attorney-client relationships far beyond the borders of the District of Columbia and to impair the goals of the ethical principles that require attorneys to protect client confidences. It undermines

---

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

the certainty of clients and attorneys nationwide that their communications will remain confidential, and it may confound many thousands of persons who, anticipating their own death, seek the advice of attorneys to assist in ordering their affairs.

Indeed, it is fair to assume that hundreds of thousands if not millions of Americans live today—in hospitals, nursing homes, hospices, or in their own homes—in the expectation that they may soon die, whether from disease, old age, or occupational perils, or—like the client in this case—by their own hands. Many of these people undoubtedly have secrets and confidences that, if revealed, would be at the least highly embarrassing themselves or their friends and loved ones. These might include wrongs done to others by themselves, their friends, or members of their families; hidden assets or financial transactions; or illegitimate children or relationships. Countless other examples could be given.

The attorney-client privilege exists in large part because disclosure to lawyers of secrets such as these enables people to obtain advice and assistance to guide future action or to rectify or ameliorate the consequences of past actions. Absent the assurance of confidentiality, such disclosures likely would never be made. The existence and integrity of the attorney-client privilege does not obstruct the truth-finding process. Instead, it promotes disclosure of the truth to lawyers and fosters actions available under the law to redress wrongs that might otherwise be left undiscovered and unaddressed. Decisions such as the one below threaten to impede these important aims.

A decision with such a far-reaching impact on the attorney-client relationship, on the legal profession, and on the administration of justice merits review by this Court. It clearly presents, in the words of this Court's Rule 10(c), "an important question of federal law that has not been, but

should be, settled by this Court." Thousands of lawyers in this country have long believed that the privilege continues to protect client confidences after the client's death. Whether they are wrong, or whether federal courts will continue to recognize this protection, is a matter this Court should decide.

A. The Importance of the Privilege

This Court has long recognized the significant public policies served by the attorney-client privilege and the importance of the privilege to the administration of justice under law:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated ... in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of

> justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

The American Bar Association has similarly emphasized the critical importance of attorney-client confidentiality, and has promulgated model ethical standards that reinforce the obligation of confidentiality that is protected by the privilege. The official comments to Rule 1.6 of the ABA's Model Rules of Professional Conduct describe the policies underlying the ethical requirement of attorney-client confidentiality in terms that parallel those used by this Court in *Upjohn*:

> [2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
>
> [3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.
>
> [4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and

> frankly with the lawyer even as to embarrassing or legally damaging subject matter.

B. The Traditional Rule

The attorney-client privilege, and the parallel ethical obligation to preserve client confidences, have traditionally not been thought to be temporally limited. Comment 22 to the ABA's Model Rule 1.6 expresses the general principle: "The duty of confidentiality continues after the client-lawyer relationship has terminated." Judicial formulations of the privilege have long expressed a similar view. In one of the earliest American opinions upholding the privilege, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts wrote:

> The principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal advisor and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts *the mouth of the attorney shall be for ever sealed*.

Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1834) (emphasis added).

Justice David Brewer put the matter similarly in an opinion written shortly before his appointment to this Court:

> [I]t is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that *that lawyer's tongue is tied from ever disclosing it* . . . .

United States v. Costen, 38 F. 24 (C.C.D. Colo. 1889) (emphasis added).

The view that the privilege does not lapse with time is reflected in the consistent line of federal and state caselaw, cited in the Petition for Certiorari, holding that the privilege survives the death of the client. As one author has summarized the rule:

> [T]he privilege, once it attaches, persists unless the lawyer is released by the client. Upon the death of the client, no release is possible. Hence death should seal the lawyer's lips forever.[3]

The same view has found expression in the proposed final draft of the American Law Institute's Restatement (Third) of the Law Governing Lawyers, which states that "[t]he privilege survives the death of the client";[4] in Dean

---

[3] EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 234 (ABA Sec. of Litigation 3d ed. 1997); *accord* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:5, at 69 (Law. Coop. 1997) ("In all circumstances, other than the will contest exception, the privilege survives the death of the individual client . . . .").

[4] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, cmt. c, at 431 (Proposed Final Draft No. 1 1996); *see also id.* § 112, cmt. e, at 280 ("The duty of confidentiality continues so long as the lawyer possesses confidential client information. It extends beyond the end of the representation and beyond the death of the client.").

Wigmore's treatise, which says that "the privilege continues even after the *end of the litigation* or other occasion for legal advice and even after the *death of the client*";[5] in Judge Weinstein's treatise on evidence, which expresses "the general rule that the lawyer-client privilege survives the death of the client";[6] in Professors Hazard's and Hodes's treatise on *The Law of Lawyering*, which states that "since confidentiality (and the attorney-client privilege) are designed as inducements to speak at the time of the client-lawyer consultation, it is almost universally held that the lawyer's duty to maintain silence survives not only the relationship but also the death of the client";[7] and in this Court's proposed Federal Rule of Evidence 503, which would have provided for the survival of the privilege after the client's death.[8] The ABA's Ethics Committee summarized the rationale for the survival of the privilege in its Informal Opinion 1293:

> [T]here is no rule or reason to say that any such confidences and secrets should not be preserved indefinitely. Any other rule would mean that promptly upon the death of a client the privilege would be annulled and the attorney would be at liberty to disclose information which had been confided in him by the client while alive. This, to say the least, could lead to numerous serious problems involving the

---

[5] 8 J. WIGMORE, EVIDENCE § 2323, at 631 (McNaughton rev. 1961).

[6] 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.32, at 503–96 (2d ed. 1997).

[7] 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.6:101, at 131 (1998).

[8] *See* PROPOSED FED. R. EVID. 503(c) ("The privilege may be claimed by . . . the personal representative of a deceased client . . . .").

client's representatives, surviving relatives and business associates. Such a concept would be in contravention of the very purpose of the privilege.[9]

C. The Lower Court's Flawed Reasoning

Although the D.C. Circuit's opinion does not purport to abrogate the privilege altogether upon the client's death, it fundamentally transforms the privilege by subjecting it to a court's balancing of the need for the information against the interests served by confidentiality. The D.C. Circuit's ruling is a departure from the ordinary rule that the attorney-client privilege, unlike privileges or protections that are qualified, "'cannot be overcome by a showing of need.'"[10] Indeed, this Court has noted that making the protection of a confidential communication dependent upon such a balancing test "would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996). The predictable effect of such a balancing analysis will be for a court to give preference to the needs of a party to the matter immediately at hand over the interests of an individual who is deceased and the more generalized policy interests of society in fostering attorney-client confidences.

---

[9] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1293 (1974) (Maintenance of Confidences and Secrets of a Deceased Client).

[10] *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989) (quoting Saltzburg, *Corporate and Related Attorney-Client Privilege: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 299 (1984)); *see also Mason C. Day Excavating, Inc. v. Lumbermens Mut. Cas. Co.*, 143 F.R.D. 601, 609 (M.D.N.C. 1992) ("Unlike work product protection, under . . . federal common law . . . , the attorney-client privilege does not implicate a balancing test wherein the privilege may be disregarded solely because the opposing party can show a sufficient need for the information.").

The D.C. Circuit justifies this substantial weakening of the privilege by its conjecture that the prospect of revelation of attorney-client confidences in criminal matters after the client's death will have little effect on the willingness of clients to confide in attorneys. Common experience—and in particular the experience of members of the ABA—suggests that the D.C. Circuit's supposition is, at best, highly speculative. Every day, thousands of clients consult their attorneys with the object of ordering their affairs and providing for their families and loved ones in the event of their death—consultations that would not occur if clients were truly indifferent to what happened after they died.

While acknowledging that clients regularly show great concern for the effect of events after their death on the pecuniary well-being of their heirs, the D.C. Circuit nonetheless held that *criminal* matters will rarely implicate client interests that will survive death. The court reasoned that, by definition, the client cannot be held criminally liable after death; and it discounted the client's possible concern with the effect of a criminal matter on the client's reputation after death, stating that only a client with a near-Pharaonic interest in immortality would be concerned with such matters.

The court's reasoning is curious. We know that clients regularly show vital concern for their families' material well-being after their death. Why should we assume they would be less concerned about the possibility that their friends and loved ones might face criminal penalties?[11] Moreover, even if the odd notion that people care more about their survivors' financial interests than about whether they may be prosecuted

---

[11] *Cf.* FED. R. EVID. 804(b)(3) (equating statements against pecuniary interest with statements against penal interest for purposes of applying hearsay rules).

and imprisoned were true, criminal matters often have extraordinarily grave financial consequences for their subjects (and their subjects' families). A client aware that an attorney-client confidence could be disclosed to a prosecutor or grand jury after the client's death could have great reason to fear that the result would be substantial fines and forfeitures that could ruin members of the client's family—even, possibly, family members innocent of any crime. *Cf. Bennis v. Michigan*, 516 U.S. 442 (1996).

As for the supposition that the concern of clients for their reputation after their death is so slight that the prospect of disclosure will not chill attorney-client communications, it, too, seems contrary to reason and experience. The maxim that "a good reputation is more valuable than money" has survived for centuries.[12] The consciousness that reputation lives on after death is evident not only in the works of memoirists and philanthropists, but in the efforts of ordinary men and women down to their last days to maintain the good regard of their friends and neighbors.[13] The depth of this concern is captured by Cassio's lament from *Othello*, act 2, scene 3:

> Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial.

---

[12] PUBLIUS SYRUS, MAXIM 108 (42 B.C.).

[13] To cite only one example, President Grant—hardly a man of Pharaonic immodesty—spent the last months of his life in a successful race to complete his memoirs before he died of cancer, in order not only to secure his reputation for posterity, but also to provide the wherewithal for his family to extricate itself from the financial and legal difficulties into which he had brought it. E.B. Long, *Introduction* to ULYSSES S. GRANT, PERSONAL MEMOIRS OF U.S. GRANT, xx–xxii (1952) (Da Capo Press reprint 1982).

D. The Impact of the Decision

Regardless of whether the D.C. Circuit's reasoning is, in the end, found to be persuasive, this Court should address the issue. The D.C. Circuit's opinion, although binding precedent only in the federal courts of the District of Columbia, has a far larger practical impact. Given the scope of criminal investigations, clients anywhere in the country may have reason to fear that their confidences will someday become relevant to federal criminal proceedings before grand juries or courts in the District. Even though client confidences may be fully protected under the law of the state in which they were made, the D.C. Circuit's new federal rule would negate those protections in a federal criminal proceeding.[14] For exactly this reason, this Court has recognized the undesirability of federal privilege rules that have the effect of frustrating the purpose of state-law rules that foster socially valuable confidential communications. *Jaffee v. Redmond*, 116 S. Ct. at 1930.

Moreover, even a single opinion on such an issue from a prominent and respected federal appellate court creates a pressing need for a definitive resolution by this Court. Absent such a resolution, lawyers and clients are left to guess whether the D.C. Circuit's rule will be adopted by other federal courts (or whether some other federal court might apply its own balancing test to extend the principle to civil cases that the court may perceive to present issues sufficiently serious to outweigh the privilege of a dead client). In such a climate, prudent attorneys anywhere in the country will advise their clients—and particularly any clients whose death may seem imminent—that they should assume

---

[14] *See* FED. R. EVID. 501 (providing that federal common law of privilege governs in federal courts except where state law provides the substantive rule of decision on a claim or defense in a civil action).

their communications will *not* remain confidential after they die. A cautious client may well respond by withholding information that is necessary to effective representation by the lawyer. Even without more widespread adoption, the D.C. Circuit's opinion thus may chill attorney-client communications and frustrate the very purposes of the privilege. For this reason, it is essential that this issue—unlike some others—not "percolate" further through the lower courts before being taken up by this Court. The uncertainty created by the decision is, from the standpoint of the privilege, as harmful as the rule announced by the court.

Nor is this an issue likely to affect only an insubstantial portion of the public. There are undoubtedly many thousands of people who live in the expectation of death and who want and would benefit from legal advice about matters that are personally embarrassing at the least and that might have even more serious consequences for surviving loved ones and friends. The D.C. Circuit's opinion makes clear that the assurance of confidentiality that can be given by lawyers to such clients is tenuous. Mindful that "[a]n uncertain privilege . . . is little better than no privilege at all," *Upjohn*, 449 U.S. at 393, this Court should put an end to the uncertainty created by the lower court on this important issue.

II.
THE COURT OF APPEALS' DENIAL OF OPINION WORK-PRODUCT STATUS TO ATTORNEY NOTES ALSO MERITS REVIEW BY THIS COURT

The D.C. Circuit's equally unprecedented denial of work-product protection to an attorney's notes of an initial client interview also merits review by this Court. Such notes, reflecting the attorney's own mental impressions, have long been at the heart of this Court's definition of "opinion work product." *See Upjohn*, 449 U.S. at 399. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329

U.S. 495 (1947), forcing an attorney to reveal such notes, reflecting "his language, permeated with his inferences" would be "demoralizing to the Bar" in the extreme. *Id.* at 516–17.

The D.C. Circuit majority's view that notes of an initial client interview, unlike notes of other witness interviews, reflect few of the attorney's own thoughts and opinions does not accord with the experience of practicing lawyers. The court's conception of the lawyer in an initial interview as a mere passive recipient of information misses the mark. Experienced practitioners recognize the initial interview as a critical stage in the representation of the client, in the course of which a skillful lawyer plays an important role in eliciting pertinent information and beginning to give shape to the goals and strategies to be pursued in the matter:

> One of the most important stages in legal representation is the initial client interview. The interview should be approached with the purpose of obtaining an exhaustive account of the client's predicament and outlining available solutions. Although proceeding to trial is not always the solution eventually chosen, experienced lawyers recognize the initial interview as crucial to the preparation for trial.[15]

Lawyers in the initial interview begin to "assess[] the truth and accuracy of a client's story based upon her comments, manner, delivery and gestures,"[16] guide the discussion toward facts and issues they perceive to be relevant, and discuss possible alternative courses of action to

---

[15] FRED LANE, LANE GOLDSTEIN TRIAL TECHNIQUE § 1.03, at 3 (3d ed. 1997).

[16] *Id.* §1.07, at 5.

be pursued. A good lawyer's conduct of such an interview reflects recognition that "[t]he initial interview can set the tone for the entire case,"[17] and that the objective is "to identify the client's hidden agenda" so that the lawyer may "address the most critical matters immediately and design [the lawyer's] overall approach around the client's particular needs."[18] The lawyer's notes taken in this process necessarily reflect not only the way he or she has helped shape the interview, but also the lawyer's professional judgment about the relative importance of the various subjects discussed in the interview.

The D.C. Circuit's denial of opinion work-product status to the notes in this case thus represents a significant breach in the protection afforded to lawyers' thoughts and mental impressions formed in anticipation of litigation. Again, Justice Jackson's words aptly capture the potential impact of such a rule:

> The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which

---

[17] NOELLE C. NELSON, CONNECTING WITH YOUR CLIENT 1 (ABA Sec. of Law Practice Management 1996).

[18] STANLEY S. CLAWAR, YOU & YOUR CLIENTS: A GUIDE TO CLIENT MANAGEMENT SKILLS FOR A MORE SUCCESSFUL PRACTICE 3 (ABA Gen. Practice Sec. 2d ed. 1996).

> would feel the consequences of such a practice . . . secondarily but certainly.

Hickman v. Taylor, 329 U.S. at 514–15 (Jackson, J., concurring).

CONCLUSION

The issues decided in the court below are of grave concern to the legal profession. As one observer has written:

> Lawyers fret that the protections of the attorney-client privilege and the work-product immunity are being eroded. The fear is hardly surprising. Of all the evidentiary and discovery rules, these two go to the heart of both the lawyer's relationship with a client and the lawyer's jealously guarded right to develop litigation strategies without fear of compelled disclosure to an adversary.[19]

The decision of the D.C. Circuit in this case significantly erodes the scope of the attorney-client privilege and work-product protections as applied in the federal courts, with significant practical consequences for attorneys and their clients nationwide.

---

[19] EPSTEIN, *supra*, at 450.

For these reasons, as well as those set forth in the Petition, this Court should grant the Petition for Writ of Certiorari to address the important issues it presents.

Respectfully submitted,

JEROME J. SHESTACK*
PRESIDENT
AMERICAN BAR ASSOCIATION
750 N. Lake Shore Drive
Chicago, IL 60611
(312) 988-5000

WILLIAM H. JEFFRESS, JR.
SCOTT L. NELSON

**Counsel of Record for the Amicus Curiae*